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Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, ET AL., PETITIONERS,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS CALIFORNIA PHARMACISTS ASSOCIATION, ET AL., INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, ET AL., AND LYDIA DOMINGUEZ, ET AL.

STEPHEN P. BERZON
SCOTT A. KRONLAND
*STACEY M. LEYTON
PEDER J. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sleyton@altshulerberzon.com

Counsel for Respondents Lydia Dominguez, et al.

**Counsel of Record*

*DEANNE E. MAYNARD
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-8740
dmaynard@mofo.com

CRAIG J. CANNIZZO
LLOYD A. BOOKMAN
BYRON J. GROSS
JORDAN B. KEVILLE
FELICIA Y SZE
HOOPER, LUNDY & BOOKMAN, INC.
1875 Century Park East, Suite 1600
Los Angeles, CA 90067

Counsel for Respondents California Pharmacists Association, et al.

[Additional Counsel Listed On Inside Cover]

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

*LYNN S. CARMAN
MEDICAID DEFENSE FUND
8 Waterbury Lane
Novato, CA 94949
(415) 927-4023
lynnscarman@hotmail.com

STANLEY L. FRIEDMAN
445 S. Figueroa Street,
27th Floor
Los Angeles, CA 90071

ROCHELLE BOBROFF
NATIONAL SENIOR CITIZENS LAW CENTER
1444 EYE STREET, NW
Washington, DC 20005

Counsel for Respondents
Independent Living Center
of Southern California, et al.

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Respondents, who previously filed separate briefs in opposition, offer this joint supplemental brief to respond to two new assertions made by petitioners with respect to this case in their supplemental brief of December 14, 2010 filed in *Maxwell-Jolly v. Independent Living Center of Southern California, Inc.*, No. 09-958 ("Supp. Br.").

SUPPLEMENTAL REASONS THE PETITION SHOULD BE DENIED

The United States Department of Health and Human Services (HHS) recently disapproved California's proposed state plan amendments (SPAs) that reflected the various rate cuts challenged by respondents. Petitioners claim (Supp. Br. 5-6, 13) that, absent the preliminary injunctions obtained by respondents, the rate cuts would be in effect while their administrative appeal of the disapproval is pending. That claim is not supported by anything in their brief, and there is in fact no support for it.

To the contrary, HHS's disapproval is an independent bar to the rate cuts taking effect. The relevant federal regulation provides that States that participate in the Medicaid program "*must* pay for * * * services using rates determined in accordance with methods and standards specified in an *approved* State plan." 42 C.F.R. § 447.253(i) (emphases added). Because HHS disapproved the proposed amendments to implement the rate cuts, petitioners cannot

currently pay for services using any rates but the unreduced rates previously approved by the federal government. *See Oregon Ass'n of Homes for Aging, Inc. v. Oregon*, 5 F.3d 1239, 1241 (9th Cir. 1993) ("A [state] law that effects a change in payment methods or standards without HCFA approval is invalid."); *Temple Univ. v. White,* 941 F.2d 201, 214 (3d Cir. 1991) ("Without an approved State plan, there can be no approved rates and, therefore, no payments available to be made by [the State] to the hospitals."), cert. denied, 502 U.S. 1032 (1992); *Forbes Health Sys. v. Harris*, 661 F.2d 282, 286 (3d Cir. 1981) (amended state regulation "makes a change in the state reimbursement scheme which is of 'sufficient substance' to warrant HHS review prior to becoming effective"). That is so without regard to the preliminary injunctions entered in these cases.

Petitioners further assert (Supp. Br. 6) that the rate cut in one of the four separate appeals that petitioners combined into this single petition (*Dominguez*) is not affected by the disapproval of the SPAs. That particular cut, however, has been subject to intervening state legislative action that bars its implementation until at least July 1, 2012. *See* Cal. Welf. & Inst. Code § 12306.1(d)(7)(B) (signed by Governor on Oct. 19, 2010). Even after that date, the rate cut would take effect "only * * * if a court of competent jurisdiction has issued an order, that is not subject to appeal or for which the time to appeal has expired, upholding its validity." *Ibid.* In their action, the *Dominguez* respondents have also challenged the

validity of the rate cuts under the Americans with Disabilities Act and Rehabilitation Act, and those claims are still pending in the district court. Thus, the State cannot implement that rate cut until at least July 1, 2012, and until after a final disposition resolving *all* challenges to the validity of that rate cut, including challenges that are not affected at all by the issues raised in the petition.

Accordingly, because of subsequent HHS and state legislative action, the preliminary injunctions are not presently a but-for cause of the State not being able to implement any of the challenged rate cuts. Setting aside those injunctions would not allow implementation of the rate cuts, and review on an incomplete record is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN P. BERZON
SCOTT A. KRONLAND
*STACEY M. LEYTON
PEDER J. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sleyton@altshulerberzon.com

Counsel for Respondents Lydia Dominguez, et al.

*LYNN S. CARMAN
MEDICAID DEFENSE FUND
8 Waterbury Lane
Novato, CA 94949
(415) 927-4023
lynnscarman@hotmail.com

STANLEY L. FRIEDMAN
445 S. Figueroa Street, 27th Floor
Los Angeles, CA 90071

ROCHELLE BOBROFF
NATIONAL SENIOR CITIZENS LAW CENTER
1444 Eye Street, NW
Washington, DC 20005

Counsel for Respondents Independent Living Center of Southern California, et al.

*DEANNE E. MAYNARD
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-8740
dmaynard@mofo.com

CRAIG J. CANNIZZO
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BYRON J. GROSS
JORDAN B. KEVILLE
FELICIA Y SZE
HOOPER, LUNDY & BOOKMAN, INC.
1875 Century Park East, Suite 1600
Los Angeles, CA 90067

Counsel for Respondents California Pharmacists Association, et al.

**Counsel of Record*

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